Intrakota Consolidated Bhd v Mohamad Roslin bin Md Shah & Anor

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO RL–25–212 OF 2004
LAU BEE LAN J
4 FEBRUARY 2008

Civil Procedure — Judicial review — Certiorari — Application for — Whether High Court should grant certiorari to quash Industrial Court award

Labour law — Industrial Court — Award — Judicial review of — Whether High Court should grant certiorari to quash Industrial Court award — Whether Industrial Court had abdicated from its functions by failing to inquire into merits of dismissal of first respondent — Whether charge put before first respondent in domestic inquiry was void ab initio from want of material particulars

The first respondent was employed as a bus driver in the applicant company. Upon receiving complaints of bus drivers not issuing tickets to the passengers after receiving fares from them, the applicant carried out an investigation to verify the complaints. After the conclusion of the investigation, the applicant ordered the first respondent to attend a domestic inquiry ('DI') to answer a charge. The charge accused the first respondent of directing the 'penumpang' to pay the bus fare to the first respondent's 'rakan saudara' while driving the bus for the applicant ie in the course of his employment with the applicant. However, the charge proffered neither disclosed the identity of the 'penumpang' and the 'rakan saudara' nor the time and place where the alleged offence was committed. At the conclusion of the DI, the first respondent was found guilty of the charge proffered against him. Based on the findings and the recommendation of the panel of the DI, the applicant dismissed the first respondent from the service vide a notice of termination. Upon his dismissal, the first respondent made representations to the Minister of Human Resources ('the Minister') under s 20 of the Industrial Relations Act 1967 ('the Act'). The Minister in turn referred the matter to the Industrial Court ie the second respondent. The Industrial Court held that the first respondent had been dismissed without just cause or excuse because the findings of the DI were erroneous for being based on a charge which was 'defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence' of the first respondent, citing in support the Court of Appeal authority of *Esso Production (M) Inc v Maimunah bt Ahmad & Anor* [2002]

2 MLJ 458 ('the *Esso Production* case'). The Industrial Court went on further to hold that there was no need to look into the merits of the termination of the first respondent as the basis of his termination was 'fundamentally flawed from the beginning'. Being dissatisfied, the applicant sought an order of certiorari to quash the Industrial Court award. In this application, the applicant contended that the Industrial Court's refusal to look into the merits of the first respondent's termination was perverse and in excess of its jurisdiction and warranted judicial interference because the Industrial Court had abdicated from its functions under s 20 of the Act to inquire into the merits of the dismissal and the chairman of the Industrial Court ('chairman') had placed much emphasis in the Court of Appeal decision in the *Esso Production*'s case, which according to the appellant could be distinguished from the instant case. The appellant submitted that in the *Esso Production*'s case all the material particulars including the date, time and place of offence were omitted from the charge whereas in the instant case the first respondent knew the date, time and place referred to in the charge and also who his 'rakan saudara' was from the police report he had made and from his admission during his cross-examination. Therefore, the validity of the charge put before the first respondent in the DI was the pivotal issue in this matter.

Held, dismissing the application with costs:

(1) The applicant's contention that the Industrial Court had erred in refusing to look into the merits of the first respondent's termination could not be sustained. This follows the reasoning in the *Esso Production*'s case wherein it was held that the validity or otherwise of the charge is the threshold of the matter before the merits of the termination could be considered. What is of particular importance is the validity of the charge preferred against the first respondent and therefore material particulars as to time and place and identity of persons referred to in the charge are essential to enable the first respondent to know with certainty the charge leveled against him and to allow him to prepare and conduct his defence. Therefore it was not for the first respondent, who may have personal knowledge of the facts proffered in the charge, to fill in the gaps in the charge for himself. As the Industrial Court found, it was for the applicant to lay all the bare facts in the charge as the burden is always upon the applicant to show with evidence that the reasons given to terminate the first respondent's employment had been made out or proven. This approach was in accordance with the legal principles in a line of authorities (see paras 7, 8 & 15).

(2) Likewise, the applicant's contention that the chairman erred in law and fact when he concluded that the non-disclosure of all the relevant particulars prejudiced the first respondent's defence could not hold water for the same reasons. Therefore there was nothing perverse in the rationale that the chairman acted in excess of his jurisdiction when he found it not necessary to look into the merits of the termination (see paras 9 & 12)

(3) Further the contention that there was a consistent body of authorities to support the proposition that the initial defect in natural justice was cured by the inquiry held by the Industrial Court could not stand because these authorities could not be extended to cure a defect involving the issue of the validity or otherwise of a charge before the DI which impinged on a pivotal and threshold issue. To do so would be stretching the ratio decidendi of the authorities thereto (see paras 13 & 14).

[Bahasa Malaysia summary

Responden pertama diambil bekerja sebagai pemandu bas di syarikat pemohon. Selepas menerima aduan mengenai pemandu-pemandu bas tidak memberikan tiket kepada penumpang selepas menerima tambang daripada mereka, pemohon membuat siasatan untuk mengesahkan aduan-aduan tersebut. Selepas tamat siasatan, pemohon menyuruh responden pertama hadir untuk siasatan domestik ('SD') untuk menjawab pertuduhan. Pertuduhan tersebut menuduh responden pertama mengarahkan penumpang membayar tambang bas kepada rakan saudara responden pertama semasa memandu bas untuk pemohon iaitu semasa penggajiannya dengan pemohon. Walau bagaimanapun, pertuduhan yang dikenakan tidak mendedahkan identiti penumpang dan rakan saudara dan juga masa dan tempat di mana kesalahan yang didakwa dilakukan. Di penghujung SD, responden pertama didapati bersalah terhadap pertuduhan yang dikenakan ke atasnya. Berdasarkan penemuan dan cadangan panel SD, pemohon memecat responden pertama dari perkhidmatan melalui notis penamatan. Selepas dipecat, responden pertama membuat rujukan kepada Menteri Sumber Manusia ('Menteri') di bawah s 20 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'). Menteri sebaliknya merujuk perkara tersebut ke Mahkamah Perusahaan iaitu responden kedua. Mahkamah Perusahaan memutuskan bahawa responden pertama telah dipecat tanpa alasan yang munasabah kerana penemuan SD adalah salah kerana berdasarkan kepada pertuduhan yang 'defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence' responden pertama, dengan merujuk untuk sokongan autoriti kes Mahkamah Rayuan *Esso Production (M) Inc v Maimunah bt Ahmad & Anor* [2002] 2 MLJ 458 ('kes *Esso Production*'). Mahkamah Perusahaan selanjutnya menyatakan bahawa tidak ada keperluan

untuk melihat merit penamatan responden pertama kerana asas untuk penamatannya adalah 'fundamentally flawed from the beginning'. Tidak puas hati pemohon memohon perintah certiorari untuk membatalkan award Mahkamah Perusahaan tersebut. Di dalam permohonan ini, pemohon menghujah bahawa keengganan Mahkamah Perusahaan untuk melihat ke dalam merit penamatan responden pertama adalah bertentangan dan melebihi bidang kuasa dan mewajarkan campur tangan kehakiman kerana Mahkamah Perusahaan telah melepaskan daripada fungsi-fungsinya di bawah s 20 Akta tersebut untuk menyiasat merit pemecatan dan pengerusi Mahkamah Perusahaan ('pengerusi') telah meletakkan penekanan yang lebih kepada keputusan Mahkamah Rayuan di dalam kes *Esso Production*, yang menurut perayu boleh dibezakan daripada kes ini. Perayu menghujah bahawa di dalam kes *Esso Production* semua butir-butir material termasuk tarikh, masa dan tempat kesalahan tidak dimasukkan di dalam pertuduhan manakala di dalam kes ini responden pertama mengetahui tarikh, masa dan tempat yang dirujuk di dalam pertuduhan dah juga siapa rakan saudara daripada laporan polis yang dibuatnya dan daripada pengakuannya semasa pemeriksaan balasnya. Oleh itu, kesahan pertuduhan yang dikemukakan kepada responden pertama di dalam SD adalah isu penting di dalam perkara ini.

Diputuskan, menolak permohonan untuk semakan kehakiman dengan kos:

(1) Hujahan pemohon bahawa Mahkamah Perusahaan telah terkhilaf dalam menolak untuk mempertimbangkan merit penamatan responden pertama tidak boleh dikekalkan. Ini berikutan alasan di dalam kes *Esso Productio*n di mana ia diputuskan bahawa kesahan atau sebaliknya pertuduhan adalah asas perkara tersebut sebelum merit penamatan boleh dipertimbangkan. Apa yang paling penting ialah kesahan pertuduhan yang dikenakan terhadap responden pertama dan oleh itu butir-butir penting seperti masa dan tempat dan identiti orang-orang yang dirujuk di dalam pertuduhan adalah penting untuk memastikan responden pertama mengetahui dengan tepat pertuduhan yang dikenakan terhadapnya dan memberikannya peluang untuk bersedia dan mengendalikan pembelaannya. Oleh itu responden pertama, yang mungkin mempunyai pengetahuan secara peribadi mengenai pertuduhan yang dikenakan ke atasnya, tidak sepatutnya mengisikan perkara yang ditinggalkan di dalam pertuduhan dengan sendiri. Seperti yang didapati oleh Mahkamah Perusahaan, pemohon sepatutnya menyenaraikan kesemua fakta-fakta jelas di dalam pertuduhan kerana beban adalah biasanya ke atas pemohon untuk menunjukkan dengan keterangan bahawa alasan-alasan yang diberikan untuk penamatan pekerjaan responden pertama telah dijelaskan atau dibuktikan.

Pendekatan ini adalah menurut prinsip-prinsip undang-undang yang sejajar dengan autoriti-autoriti (lihat perenggan 7, 8 & 15).

(2) Begitu juga, hujahan pemohon bahawa pengerusi telah terkhilaf dari segi undang-undang dan fakta apabila beliau memutuskan bahawa kegagalan pendedahan kesemua butir-butir relevan memprejudis pembelaan responden pertama, juga tidak berasas, atas alasan-alasan yang sama. Oleh itu tidak ada apa-apa yang bertentangan dengan rasional bahawa pengerusi bertindak melampaui bidang kuasa apabila beliau mendapati ia tidak perlu untuk mempertimbangkan merit penamatan (lihat perenggan 9 & 12).

(3) Selanjutnya, hujahan bahawa terdapat autoriti-autoriti yang konsisten untuk menyokong kenyataan bahawa kecacatan awal dalam keadilan semula jadi telah diatasi dengan siasatan yang dibuat oleh Mahkamah Perusahaan tidak boleh ditegakkan kerana autoriti-autoriti ini tidak boleh dilanjutkan untuk mengatasi kecacatan yang melibatkan isu kesahan atau sebaliknya berkenaan pertuduhan sebelum SB yang mempengaruhi isu utama dan asas. Berbuat demikian akan meregangkan lagi ratio decidendi autoriti-autoriti tersebut (lihat perenggan 13 & 14).]

Notes

For cases on award, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1351–1411.

For cases on judicial review in general, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4324–4328.

Cases referred to

Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111 (refd)

Gardenia Bakeries (KL) Sdn Bhd v Gunasegaran Ramasamy [2004] 2 ILR 586 (refd)

Gardenia Sales & Distribution Sdn Bhd v Tee Che Kiong [2002] 3 ILR 1075 (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129 (refd)

Esso Production (M) Inc v Maimunah bt Ahmad & Anor [2002] 2 MLJ 458 (folld)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1995] 1 MLJ 481 (refd)

I Bhd v K A Sandurannehru a/l Ratnam & Anor [2004] 6 MLJ 127 (distd)

Milan Auto Sdn Bhd v Wong See Yen [1995] 3 MLJ 537 (refd)

Simex Marketing Sdn Bhd v Abdul Manap Baba [2005] 3 ILR 21 (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129 (distd)

A *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal* [1995] 2 MLJ 753 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20, 30(5)

B Rules of the High Court 1980 O 53 r 5(3)

Rajeswari (Zul Rafique & Partners) for the applicant.
Mahadi (Mahadi Redzuan & Co) for the first respondent.

Lau Bee Lan J:

C

[1] By the applicant's application for judicial review (encl 1), the applicant is essentially seeking for an order of certiorari to quash Industrial Court Award No 905 of 2004 dated 28 July 2004 in Industrial Court Case No

D 19/4–320/02 after obtaining the prerequisite leave on 14 March 2005.

[2] The first respondent was employed as a bus driver in the operations division of the applicant company and at the time of his dismissal on 22 June 2000, he was drawing a basic salary of RM883.52 per month plus a fix

E laundry allowance of RM40 per month and was paid overtime claims which are subjected to the hours of work in excess of hours stipulated in his contract of employment. The applicant carried out an investigation on 7 April 2000 on bus route 24 to verify complaints received from the passengers in the Ampang area that the applicant's drivers were receiving fares from passengers

F without issuing tickets. After the conclusion of the investigation, the first respondent was required to attend a domestic inquiry ('DI') which eventually commenced proceedings on 24 May 2000 to answer the following charge:

> G Bahawasanya saudara Mohamad Roslin bin Md Shah (02987), seorang petugas dalam perkhidamtan Intrakota Consolidated Berhad, telah melakukan salah laku mengarah penumpang memberi wang kertas RM2.00 No. Siri DW 3273427 yang merupakan tambang penumpang tersebut kepada rakan saudara semasa menjalankan tugas memandu bas WFK 2526 pada 7 April 2000.

H At the conclusion of the DI, the panel of the DI found the first respondent guilty of the charge proffered against him. Based on the findings and recommendation of the panel of the DI, the applicant dismissed the first respondent from service with effect from 22 June 2000 vide a notice of termination dated 20 June 2000 (p 64 of encl 3, affidavit of Abdul Latif

I Abdul Aziz, affirmed on 20 September 2004). Pursuant to representations made by the first respondent under s 20 of the Industrial Relations Act 1967 (Act 177) ('the Act'), the Minister of Human Resources referred the matter to the second respondent ie the Industrial Court.

The learned chairman of the Industrial Court made a decision in favour of the first respondent and held that the applicant had been dismissed without just cause or excuse since the findings of the panel of the DI were erroneous for being based on a charge which is *defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence of the claimant* following the Court of Appeal authority of *Esso Production (M) Inc v Maimunah bt Ahmad & Anor* [2002] 2 MLJ 458 and further *there is no need to look into the merits of his termination as the basis of his termination is fundamentally flawed from the beginning* ('the impugned award'). Being dissatisfied with the impugned award, the applicant now seeks to quash it.

[3] Pursuant to the statement under O 53 r 5(3) of the Rules of the High Court 1980 ('the RHC') dated 20 September 2004 (encl 2) the applicant raised four (4) errors of the Industrial Court. However in her written submission dated 16 January 2007, learned counsel for the applicant, Ms Rajeswari submitted that the grounds can be summarised to two (2) main arguments:

(i) Whether the Industrial Court had given a narrow and pedantic interpretation to the case of *Esso Production (M) Inc v Maimunah bt Ahmad & Anor* [2002] 2 MLJ 458 and thereby abdicated its duties under s 20 of the Industrial Relations Act 1967; and

(ii) Whether the Industrial Court in handing down its decision based on the narrow and pedantic application of the case of *Esso Production Malaysia(M) Inc v Maimunah Ahmad & Anor* [2002] 3 MLJ 458, had failed to consider and apply the principles enunciated in the Supreme Court case of *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111.

[4] Before I delve into the first line of argument, for comprehension of the arguments, it is appropriate for me to reproduce below the reasons and findings of the learned chairman of the Industrial Court at pp 6–10 of the impugned award when deliberating the first respondent's submission that the charge preferred against him was defective for want of particulars in relation to the 'penumpang', 'rakan saudara', 'the time of the alleged offence' or 'the place where the alleged offence was committed':

> In this case there is no dispute that the dismissal of the claimant was grounded upon the findings of the internal board of inquiry that the charge against the claimant had been proven. That being the threshold of the claimant's termination, hence the validity of the charge proferred against the claimant is of prime importance. It is the pivotal issue.

The charge levelled against the claimant is obviously criminal or semi criminal in nature. Though it does not impose an additional burden, nevertheless the company is under a legal duty that the charge proferred has to positively and precisely state the offence the claimant is alleged to have committed so that he knows with what he is charged and may be prepared to answer the charge in the best way possible. The chare is precisely a notice to the offender of the matter with which he is accused of. Additionally, to borrow the position in terms of its phraseology from *Jager Singh v Public Prosecutor* [1936] MLJ Rep 92, which I find to be equally applicable in his proceedings:

> *The charge … must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself …*

Since the charge against the claimant is criminal or semi criminal in nature, in my view there is thus clearly a specific duty imposed on the company to particularised the charge sufficiently so as to give adequate notice to the claimant and consequently to enable him to adequately prepare and conduct his defense notwithstanding that the Industrial Court should not be too bogged down with legal technicalities or form.

Adverting to the case before me, I am of the view that the charge as proferred are defective and bad in law for non-disclosure of material particulars as complained by the claimant. On the same account it is also highly prejudicial to the claimant's defence. Since the claimant was accused of directing the *penumpang* to pay his bus fare to the claimant's *rakan*, it is only proper that the identity of the said *penumpang* and *rakan* should be disclosed in the charge. God knows how many *penumpang* has embarked and disembarked from his bus since he took over duties on that day. Therefore in such event the need to identify which *penumpang* in issue is very real. The non disclosure of the identify of the said *penumpang* is certain to hamper the adequacy of the claimant's defence for he would be placed in limbo to conjecture which particular penumpang was meant by the company. The same equally applies to the non-disclosure of said *rakan* and the time and place where the alleged offence was committed. Only God knows how many *rakan* the claimant has brought along in his bus that day. Or which *rakan* is the relevant *rakan* in issue. These are facts well within the knowledge of the company. It may well be that it is also within the personal knowledge of the claimant, but it is not for the claimant to fill in the gaps. The duty is upon the company to profer a charge which is clear and unambiguous to enable the claimant to know with what he is being charged for and may be prepared to answer the charge in the best way possible. It is for the company to lay all the bare facts as the burden is always upon the company to show by evidence that the excuse or reasons given to terminate the claimant's employment has been made out or proven.

In *Esso Production Inc v Maimunah Ahmad & Anor* [2002] 2 MLJ 458, Abdul Kadir Sulaiman JCA at p 248 said:

> *The validity or otherwise of the charges is the threshold of the matter before the merit could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that*

such charges for want of material particulars is void abinitio. With that we agree with the learned judge that on such improper charges before the board of inquiry, the finding of guilt upon the first respondent could not stand, thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground alone, this appeal of the appellant against the decision of learned judge ought to be dismissed.

For the reasons given, it is my findings that the charges against the claimant are defective and bad in law for want of material particulars and for its highly prejudicial nature to the defence of the claimant. Their consequential effects are very obvious. As said Abdul Kadir Sulaiman JCA in *Esso Production Malaysia Inc*:

A proper tribunal having to decide on such bad charges would not have come to the conclusion arrived at by the board of inquiry of the appellant.

Since the basis of the finding of the board of inquiry is erroneous, its findings could not have therefore, formed the basis to terminate the claimant's employment. Since this is the reason given by the company for terminating the claimant's employment, his termination is clearly without any just cause or excuses. Plainly, the termination of the claimant is unlawful. That being so, following *Esso Production Malaysia Inc*, there is no need to look into the merits of his termination as the basis of his termination is fundamentally flawed from the beginning.

[5] Perusing the four (4) errors identified in the statement, I see no reason to depart from the approach taken by learned counsel for the applicant. Under the first line of argument, learned counsel for the applicant contends that the rationale of the learned chairman of the Industrial Court to refuse to look into the merits of the first respondent's termination is perverse and in excess of its jurisdiction which warrants interference of this court basically on the following grounds:

(a) the Industrial Court cannot abdicate its functions under s 20 of the Act to inquire into the merits of the dismissal on the strength of the Federal Court cases of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 H – I (left), *Wong Yuen Hock v Hong Leong Assurance Sdn Bhd & Anor* [1995] 2 MLJ 753 at p 352 f – g; and *Milan Auto Sdn Bhd v Wong See Yen* [1995] 3 MLJ 537 at pp 542 I – 543 A

(b) The learned Industrial Court chairman placed much emphasis on the Court of Appeal decision in *Esso Production Malaysia* but 'failed to act towards the fidelity of the principle set out in the [case]' for primarily three (3) main reasons. The first reason for purposes of clarity, I shall reproduce the material parts thereof:

    (i) In the case of *Esso Production Malaysia Inc*, all material particulars including date, time and place of the offence were omitted form the charge and hence the rationale was that the employee was not

A able to know when the alleged offences were committed by her. As such, the court in that case ruled that the charge was void ab initio.

B **[6]** Learned counsel for the applicant contends that in the instant case, the first respondent 'not only knew the date, time and place referred to in the charge but also knew who his 'rakan saudara' was based on the following evidence:

C (a) The first respondent's police report dated 17 June 2000 where he stated: [see p 26 annexed to exh AL-3 of the applicant's affidavit No 1]

> Pada *7 April 2000 jam lebih kurang 10.15 malam, saya sedang memandu bas no WFK 2526 Laluan No 24 C* bersama seorang penyelia nama En Fadhil. Selepas itu, dia mengarahkan saya balik ke Depoh di Pandan Indah. Semasa di situ saya disoal siasat bersama seorang *penumpang yang saya kenali*. Pengurus saya nama En Awalluddin menyuruh saya keluarkan dompet dan menunjukkan duit jumlah RM2. *Didapati, duit itu berada dengan penumpang yang saya kenali itu* dan salinan photostat duit itu ada dengan penyelia saya.

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(b) The first respondent's admission during his cross-examination: (see p 27 annexed to exh Al-9 of applicant's affidavit No 2)

> Q: Dalam laporan ini awak menyatakan awak kenal penumpang tersebut.
>
> A: Ya.
>
> Q: Dalam laporan polis ini awak kata lelaki ini adalah rakan awak.
>
> A: Ya.

F

G **[7]** It is to be noted a similar line of argument was canvassed by learned counsel for the appellant in *Esso Production* when His Lordship Abdul Kadir Sulaiman JCA (as he then was) stated at p 462 F–G.

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> Before us, learned counsel for the appellant contends that this issue was irrelevant for the learned judge to consider because the first respondent admitted and did not dispute either during the domestic inquiry or during the proceedings before the second respondent that she had received RM400 in the form of a cheque from Haji Aladdin, which she cashed and therefore, the merits should be considered. We do not think that we could agree with the contention of the learned counsel

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and at p 463 G–H:

> Hence, the substance relating to the two charges cannot be brushed aside as being of no significance. Taking the words of the learned counsel for the appellant in his submission that the first respondent admitted and did not dispute, either during

> the domestic inquiry or during the proceedings before the second respondent, that she had received the money and cashed it, and there was also in the evidence a statement recorded from her during the investigation stage. At least from the purported statement, surely the date, time and place the offences were alleged to have been committed would have been known to enable proper charges to be framed against her

and there was also in the evidence a statement recorded from her during the investigation stage. At least from the purported statement, surely the date, time and place the offences were alleged to have been committed would have been known to enable proper charges to be framed against her. (Emphasis added). In dismissing the arguments of the appellant in *Esso Production*, His Lordship at p 463 E–G opined:

> *So, the validity or otherwise of the charges put before the internal board of inquiry is the pivotal issue in this matter. The issue being one of law, the learned judge is correct when he said that it could be raised at any stage of the proceedings in the matter. Looking at the two charges labeled against the first respondent during the inquiry leading to the findings of the board, resulting in the dismissal of the first respondent by the appellant, they are indeed criminal or at least semi-criminal in nature, the consequence of which would deprive the first respondent of her right to livelihood as indeed had happened to her by being dismissed from her employment with the appellant (see Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1995] 1 MLJ 481).

and further on the same p 1–p 464 A–C:

> On the two charges, the burden is on the party that alleges to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. They are material particulars required to be disclosed in the charges. Without that, how would one accused upon the charges be able to prepare proper defences to them. Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the second respondent would not entitle the learned judge of the High Court in this instance, to proceed to consider the merits of the case. The validity or otherwise of the charges is the threshold of the matter before the merits could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that such charges for want of the material particulars is void ab initio. With that, we agree with the learned judge that on such improper charges before the board of inquiry, the finding of guilt upon the first respondent could not stand thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground alone, this appeal of the appellant against the decision of the learned judge ought to be dismissed.

[8] Following the reasoning in *Esso Production Inc* where the Court of Appeal did find not favour with the arguments of the appellant and which argument as I have alluded similarly formed the basis of learned counsel for

A the applicant's contention that the learned chairman has erred in refusing to look into the merits of the first respondent's termination, I am likewise of the view that the contention of the applicant cannot be sustained.

B **[9]** The second reason submitted on the applicant's behalf to support the first line of argument is the contention that the 'learned chairman erred in law and fact when he concluded the non-disclosure of all the relevant particulars prejudiced the first respondent's defence particularly when he choose (sic) not to give any defence at all before the inquiry'.

C I am of the view that this contention cannot hold water for the same reasons referred to in paras 7 and 8 above.

[10] The third reason advanced on behalf of the applicant in support of the first line of argument is learned counsel's contention 'by applying the
D principle of *Esso Production Inc* in a dogmatic manner, the learned chairman … acted in defiance of the express wordings of s 30(5) of the [Act]' and to support this proposition, the cases of *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129 (CA) at p 322G–I through p 323A and *I Bhd v K A Sandurannehru a/l Ratnam & Anor* [2004]
E 6 MLJ 127(HC) at p 464 D–H and at p 465C. It is my view that the argument of the applicant is flawed because it is patently clear that both the aforesaid authorities can be distinguished as they pertain to the question of the applicable standard of proof and not a question of pivotal and threshold issue of the validity or otherwise of the charges before the DI as in the present
F matter.

In the *Telekom Malaysia Kawasan Utara* case, this fact is borne out when Abdul Hamid Mohamad JCA (now Chief Justice Malaysia) at p 317F–G stated 'Simply put, the question [before the Court of Appeal] is: when an employee is dismissed on the ground that he has committed an act of
G dishonesty like 'theft' of the employer's property, *must* the 'offence' *be proved beyond reasonable doubt* as in a criminal prosecution in the court of law (emphasis added). Similarly in *I Bhd*, at p 462F–G, His Lordship, Balia Yusof JC (now High Court Judge) stated 'I find that in a nutshell it is essentially the issue of standard of proof that forms the basis of this application'.

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[11] Apart from the arguments put forth by learned counsel for the applicant which regrettably I cannot agree for the reasons given, there is an additional reason which I find justifies why the learned chairman of the Industrial Court was correct in refraining from proceeding to consider the
I merits of the case. It is to be observed that it did not escape the attention of the Court of Appeal in *Esso Production Inc* that *[I]n the proceedings before the second respondent [Industrial Court] resulting in the impugned award, as the issue of the defective charges was never an issue, the second respondent decided the matter on the merits based on the evidence tendered before him* and therefore

substantiated with reference to p 14 of the impugned award (see p 464C–E). Despite this Abdul Kadir Sulaiman JCA (as he then was) stated at p 462G left, after counsel for the appellant's submission that the merits of the case ought to be considered as per para 7 at p 10 line 23–p 11 line 7 above, '*We do not think that we could agree with the contention of the learned counsel*; and further in retort to again counsel for the appellant's contention, at p 463 I right, stated *Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the second respondent [IC] would not entitle the learned judge of the High Court in this instance, to proceed to consider the merits of the case*.

[12] For the reasons proferred, I hold there is nothing perverse in the rationale nor did the learned chairman of the Industrial Court acted in excess of jurisdiction when he found it not necessary to look into the merits of the applicant's termination. Hence, my answer to the first line of argument is in the negative.

[13] I now turn to the second line of argument wherein learned counsel for the applicant contends there is failure on the part of the learned Industrial Court chairman to consider and apply the principles enunciated in *Dreamland Corp*. In this regard learned counsel submitted '[T]here is a consistent body of authorities which state that the initial defect in natural justice in not holding a domestic inquiry is cured by the inquiry held by the Industrial Court which provides a better and impartial forum for an employee to state his defence'. The 'consistent body of authorities' meant by learned counsel are *Dreamland Corp* (SC), *Hong Leong Assurance* (FC) and endorsed in *Milan Auto Sdn Bhd* FC. Learned counsel further contends '*[N]otwithstanding the fact that there is a consistent body of authorities that state that the initial defect of an internal inquiry or not having a inquiry is curable in the Industrial Court, the very fact that the learned chairman of the Industrial Court said there is no need to inquire the merits of the case because not all particulars were furnished to the first respondent certainly makes the principles in landmark cases such as Dreamland Corp (M) Sdn Bhd, Wong Yuen Hock and Milan Auto 'superfluous'*.

[14] On the strength of the high authority cited by learned counsel for the applicant, I accept that these authorities support the proposition that 'the initial defect in natural justice in not holding a domestic inquiry is cured by the inquiry held by the Industrial Court which provides a better and impartial forum for an employee to state his defence'. However in my view, these authorities cannot be extended to cure a defect involving the issue of the validity or otherwise of a charge(s) before the DI and which impinges a 'pivotal' and 'threshold' issue. To do so would be stretching the ratio decidendi of the authorities thereto if one is to examine the passages cited by

learned counsel for the applicant in *Dreamland Corp* (p 114H–I); *Hong Leong Assurance* (p 354H–I through p 355A; p 356E–F); in *Milan Auto Sdn Bhd* (at p 543B–C). Since this body of authorities represents the law that the initial defect of an internal inquiry or not having an inquiry is curable in the Industrial Court, I find the contention of learned counsel for the applicant that these cases are rendered 'superfluous' just because the learned chairman of the Industrial Court stated there is no need to inquire into the merits of the case flawed.

[15] With due respect to the applicant's learned counsel, I cannot agree with her contention that '*the effect of upholding the decision of the learned chairman of the Industrial Court is to place an employer who chooses not to afford his employee an opportunity to be heard in a better position than an employer who attempts to afford his employee an opportunity to be heard but who are layman unskilled in the technical niceties of framing a comprehensive charge*. What is of particular importance is the validity of the charge preferred against the first respondent and therefore material particulars as to time, place and identity of persons referred to in the charge are essential to enable the first respondent to know with certainty the charge levelled against him and to allow him to prepare and conduct his defence; as the learned chairman stated at p 8 of the impugned award, 'It may well be that it is also within the personal knowledge of the claimant (first respondent), but it is not for the claimant to fill in the gaps … It is for the company to lay all the bare facts as the burden is always upon the company to show by evidence that the excuse or reasons given to terminate the claimant's employment has been made out or proven'. This approach is in accordance with the legal principles enunciated in the off-cited cases of *Goon Kwee Phoy*, *Hong Leong Assurance* and *Milan Auto Sdn Bhd*. For the reasons stated, my answer to the second line of argument is in the negative.

[16] On a final note, learned counsel for the applicant had referred the court to three (3) Industrial Court awards post — *Esso Production Inc* where the Industrial Court had looked into the merits of the reference notwithstanding the charge being defective. These awards are *Gardenia Sales & Distribution Sdn Bhd v Tee Che Kiong* [2002] 3 ILR 1075, *Gardenia Bakeries (KL) Sdn Bhd v Gunasegaran Ramasamy* [2004] 2 ILR 586 and *Simex Marketing Sdn Bhd v Abdul Manap Baba* [2005] 3 ILR 21. I agree with learned counsel for the first respondent that these awards are not binding on this court. In addition it is interesting to note the following note at p 460G in *Esso Production Inc* '[Editorial Note: The appellant's application for leave to appeal to the Federal Court (before Ahmad Fairuz Chief Judge (Malaya), Siti Normah Yaakob and Mokhtar Abdullah FCJJ) was dismissed with costs on 22 April 2002]'. What can be inferred is that the principles enunciated in *Esso Production Inc* is still good law.

[17] For the foregoing reasons, the applicant's substantive application for judicial review dated 18 March 2005 (encl 8) is dismissed with costs.

Application dismissed with costs.

Reported by K Nesan